IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1664 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

DILIPKUMAR RAMANLAL PATEL

Appearance:

1. First Appeal No. 1664 of 1980

MR KL PANDYA, AGP. for Petitioner No. 1

MR KG SUKHWANI for Respondent No. 1

MS MAYA N BHAVNANI for Respondent No. 1

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 02/04/2003

ORAL JUDGEMENT

1 This appeal is filed against the judgment and

order dated 30.8.1980 in Special Civil Suit No. 319 of 1974 passed by the Court of Civil Judge (S.D), Vadodara. The appellant i.e. the State of Gujarat is original defendant and the respondent herein is the original plaintiff (hereinafter, for the sake of convenience the parties shall be respectively referred to as the 'defendant' and the 'plaintiff').

2 The plaintiff filed suit to recover the amount of Rs,85,464.64 towards extra items, numbering six, which according to the plaintiff were not forming part of the tender contract entered into by the plaintiff and the defendant. It is undisputed that the plaintiff was awarded work contract for Remodelling of Heran Bridge on Kosindra Naswadi Road. As the form tender submitted by the plaintiff being the lowest was accepted and work order dated 8.2.1971 was issued by the defendant and as per the terms of the contract the work was to be completed within a period of four months from the date of the work order and hence the work was to be completed by 7.6.1971. However, due to hurdles, stated to be on behalf of the defendant department, the plaintiff could complete the work only in the month of August,1971. It is pertinent to note that in relation to completion of the work i.e. quantity and quality, there is no dispute between the parties, nor is there any dispute in relation to the final bill prepared and for which the payment was made by the defendant. However, the plaintiff accepted the payment as per final bill under protest as according to the plaintiff, for six items for which extra work was carried out, the defendant was liable to make payment to the plaintiff. The plaintiff made demand for the same by preferring additional bill for the said items but as the defendant did not accept the demand for making additional payment the plaintiff filed the aforesaid Civil Suit, which came to be decreed in favour of the plaintiff and hence the present appeal.

3 The first item for which the plaintiff claimed amount of Rs.7,220/- as being additional item of work carried out by the plaintiff pertains to laying of pipes and fixing of collars. To put it more appropriately, the dispute between the parties pertains to the place of delivery of the pipes and collars which were to be supplied by the defendant. As per the terms of the contract, schedule 'A' of the contract provides that IRS pipes of 42" diameter with collars shall be supplied by the defendant and the place of delivery is mentioned "approaches on the bridge". There is no dispute as to the fact that pipes were supplied by the defendant department only at the southern end or the approach of

the bridge. The case of the plaintiff was that as the pipes were not supplied at both the ends/approaches of the bridge, the plaintiff was required to incur extra expenditure for carrying pipes and collars to the bridge resulting in extra expenditure to the tune of Rs.7220/for which the plaintiff had raised claim. Though evidence has been led on behalf of the defendant as to why the pipes were not delivered at both the ends/approaches, the fact that defendant department was required to supply the pipes and collars at both the ends remain unrebutted. The reasons, even if they are correct, as to why the pipes and collars could not be delivered at both ends are not material to the issue because the fact remains that as per terms of the contract, as specified in schedule 'A' the defendant was obliged to deliver pipes and collars at both approaches which it had failed to do.

4 Mr.K.L.Pandya, learned Assistant Government Pleader appeared on behalf of the appellant submitted that even if there was a default on the part of the defendant, the defendant could not be saddled with the entire cost of carting because at the most it could be stated that only one-half of the number of pipes and collars had not been delivered as provided in the contract. Therefore, according to Mr.Pandya the claim of the plaintiff could be allowed to the extent of 50% and the Trial Court has erred in granting full relief as claimed by the plaintiff. As against this, it was submitted by Mr.Sukhwani appearing on behalf of the respondent-plaintiff that once there was a breach of the condition stipulated in the contract consequences would follow and the plaintiff had only demanded the actual expenditure incurred by the plaintiff for carrying the pipes and collars from one end of the bridge to the other end of the bridge as pipes and collars have to be laid throughout the length of the bridge.

5 Taking into consideration the submissions of both the sides as well as the terms of the contract which is available in the record at Exhibit 47 it is apparent that the defendant was liable to deliver pipes and collars at both ends of the bridge, while in fact, it had delivered the same only at one of the approaches i.e. southern approach to the bridge. In these circumstances, the Trial Court was justified in holding that the claim as regards the first item of additional cost incurred by the plaintiff was justified. However, while fixing the quantum, the additional cost that the plaintiff would be entitled, the Trial Court has failed to consider that the plaintiff could raise the dispute only in relation to one-half of the quantity of pipes and collars i.e. out

of the total number of pipes and the collars that the defendant is required to deliver at both the approaches of the bridge one-half of the total number was delivered at one of the ends and it was only the other remaining half which was delivered at wrong end. In these circumstances, the plaintiff can legitimately claim only 50% of the amount raised by way of additional item to the extent of Rs.7220/-. Thus, the plaintiff would be entitled to Rs.3610/- only in place of Rs.7220/- which were granted by the Trial Court.

6 In relation to claim for item no.2, it is the case of the plaintiff that the plaintiff was required to incur expenditure of Rs.32,712.50 being cost of construction involved in construction of superstructure in the specified proportion of 1:4:8 as specified in the contract. It was the case of the plaintiff that the said item of work was not forming part of any of the items specified in the contract and hence the additional claim.

7 It was contended on behalf of the appellant-defendant by Mr.Pandya that the Trial Court had erred in rejecting the submission made on behalf of the defendant that the said item of work was covered by item at Sr.No.8 in Schedule 'B' of the contract which specifically dealt with cement concrete work in proportion of 1:4:8. Hence, according to Mr.Pandya the plaintiff could not claim the additional amount as no additional work had been carried out beyond what was specified in the contract. In this connection, item at Sr.No.8 of Schedule 'B' was specifically read out by Mr.Pandya and it was submitted that the plaintiff had not made out any case, while on the other hand the defendant had brought on record the evidence in the form of deposition of one Shri Jayantilal Chunilal, Deputy Executive Engineer. Reading extensively from the deposition (Exhibit 91) of the said witness it was submitted by Mr.Pandya that cement concrete work is included in item at Sr.No.8 of Schedule 'B' and the said work pertained to cement concrete etc., which form part of the original contract.

8 Mr.Sukhvani, learned Advocate repelling the submission on behalf of the appellant submitted that on plain reading of item at Sr. No.8 of Schedule 'B' it was apparent that the same pertained to cement concrete work involved in foundation laying and could by no stretch of imagination take within its sweep work relatable to superstructure. Hence, it was submitted that the Trial Court had correctly held that the plaintiff was entitled to the claim of Rs.32,711.50 for this additional item not

specified in the contract.

9. Schedule 'B' of the contract deals with as many as 17 items and as can be seen each item is clearly and cogently defined. It is not possible to either read one item as falling within any other item or it can not be even contended by anyone that there is ambiguity in any of the item so as to submit that a particular work stands covered by one or other items though not specifically mentioned. When one reads items at Sr.Nos. 8,9 & 10 in juxtaposition or in contrast with each other it becomes absolutely clear that item at Sr.No.8 of Schedule 'B' can never take within its compass any contract of superstructure. Because the same pertains only to foundation and reads as under :

"cement concrete in prop 1:4:8 in foundation using black trap gravel 1 1/2" to 2" size incl. ramming, watering consolidating etc.comp."

As against this, item at Sr.No.9 specifically provides uncoursed rubble stone masonary in C.M. 1:5 for foundation and superstructure. Last item at Sr.No.10 talks of providing course rubble stone masonary C.M.1:5 and sort with khanki for facing for superstructure only.

10. In these circumstances, it is not possible to find any infirmity in the approach and conclusion of the Trial Court. The plaintiff was rightly held to be entitled to the sum of Rs.32,711.50 being cost of construction of superstructure by way of cement concrete in proportion of 1:4:8.

11 Third item of additional work stated to be carried out by the plaintiff pertains to dismantling and cleaning head wall base for masonary work and dugha laying etc. and the claim is made for a sum of Rs.3,000/-. It is submitted on behalf of the appellant-defendant that the Trial Court has erred in holding that this was an extra work carried out by the plaintiff when in fact item at Sr.No.3 Schedule 'B'covers the said item. In support of this submission the deposition (Exhibit 91) of witness on behalf of the defendant was referred to with special reference to paragraph 4 wherein the witness has stated that the work of dismantling would take within its scope the work of cleaning and the same cannot be considered as extra item of work.

12 As against this it was submitted by Mr.Sukhvani

that if items at Sr.Nos. 1, 2 & 3 of Schedule "B" of the contract are taken into consideration they pertain to dismantling the existing RCC parapet, dismantling the existing R.C.C.coping, kerb and pylon including conveying, and dismantling stone masonary in C.M. That in none of these items the work of head wall was included and even if, for the sake of argument the contention on behalf of the appellant, that in the work of dismantling work of cleaning is included is accepted, as work of head wall did not fall within any of the three items pertaining to dismantling the plaintiff was rightly held to be entitled to a sum of Rs.3,000/- as an extra item of work carried out by the plaintiff.

13 The appellant is correct when it contends that the term dismantling would include cleaning of the debris which results as process of dismantling. But the question which yet remains to be answered is whether the work of dismantling head wall can fall within any of the items at Sr.No.1, or 2 or 3 of Schedule 'B' of contract. Though item at Sr.No.3 mentions dismantling stone masonary in C.M. the same would not cover the item of head wall which is described to be wall in the central portion of the bridge as can be seen from deposition of Jayantilal Chunilal, Exh.91. Hence, as already stated hereinbefore each item being separate and individual item, without any ambiguity in description, it is not possible to find any fault with the reasoning and conclusion of the Trial Court in awarding Rs.3,000/- as being extra item of work which the plaintiff was entitled to as being work carried out beyond the terms of the contract.

14 As regards the next item relating to claim of Rs.33,090/- being course masonary work carried out upto the average height of 4.5' to 5.0' in head wall, the Trial Court has accepted the claim of the plaintiff. Mr.Pandya assailing the finding of the Trial Court on this count submitted that as could be seen from items at Sr.Nos. 9 & 10 of Schedule 'B' read with paragraph 4 of deposition Exhibit 91, it was apparent that this work was included either at Sr.No.9 or at least in item at Sr.No.10 and head wall was a part of superstructure and item at Sr.Nos. 9 and 10 pertained to superstructure. It was further submitted on behalf of the appellant that the plaintiff had taken into consideration the nature of work that plaintiff was required to carryout before he had filled up the tender and at subsequent stage it was not open to the plaintiff to make such a claim considering that the work involved remodelling of the entire bridge on River Heran.

15 As against this it was submitted by Mr.Sukhvani that he adopted his contention in relation to earlier items that head wall did not form part of any of the items falling within Schedule 'B' of the contract and merely because items at Sr.Nos. 9 and 10 referred to superstructure the defendant could not deny a legitimate claim.

16 Referring to item at Sr.Nos. 9 & 10 of Schedule 'B' it is apparent that construction of head wall would not fall within either of those two items. Item at Sr.No.9 pertains to providing uncoursed rubble stone masonary for foundation in superstructure for piers abutments and returns, wings etc. On the other hand, item at Sr.No.10 pertains to providing course rubble stone massonary with khanki for facing for superstructure. Thus, neither of the two items refers to any construction of head wall. This fact is also admitted during the course of cross-examination by the defendant witness Jayantilal Mafatlal,(Exh.91) when he has specifically stated that item nos. 9 & 10 of Schedule 'B' do not include head wall. In these circumstances reasoning and the conclusion of the Trial Court in relation to this item is found to be correct, just and no interference is called for.

17 Next item pertains to the claim for Rs.8110.11 towards work carried out for pointing of head wall. The case of the plaintiff on this count was that work relating to pointing does not form part of the contract and was undertaken as an additional work. On behalf of the defendant it was contended that the work of plastering includes the work of pointing and no separate payment can be claimed under the head of work of pointing. Mr.Sukhvani has reiterated his contention that items which do not fall within terms of contract have to be considered as item of extra work and for the same the plaintiff would be, accordingly, entitled to additional payment.

18 It is not disputed that the work of pointing does not form part of the contract Exhibit 47. It is also not disputed on behalf of the defendant that the work of pointing has to be carried out simultaneously i.e. along with construction and cannot be left out or done independently.

19 The work of pointing involves filling up of the joints in the masonary work and it is settled proposition that the joints have to be pointed as masonary work

progresses upwards and pointing work has to be carried out only one or two course behind the masonary. If this be the situation as per standard specifications prescribed, needless to state that the plaintiff had to proceed with the work and carry out the pointing work eventhough the same was not forming part of the contract. Once it was established that additional work was carried out, and this could not be disputed, as a natural corollary the plaintiff was entitled to be reimbursed or paid for the same. Therefore, there is no error on facts or law committed by the Trial Court in upholding the claim for Rs.8110.11 as being additional item of work relating to pointing.

20 Last item pertains to under payment by way of reduction in rates in relation to items at Sr.Nos.12, 15 and 17. The plaintiff claimed that Rs.1292.30 had wrongly been deducted from the payment to which the plaintiff was entitled. The case of the defendant was that if the work which had been executed was found to be of inferior quality or imperfect in any manner i.e. in workmanship or as to materials used, then the defendant was entitled to deduct the appropriate amount before settling the final bill.

21 Clause No.17 of the contract forming part of condition of contract specifically provides for the Engineer in-charge to intimate contractor about the inferior quality of work and asking the contractor to remove materials or articles so specified and provide other proper and suitable materials or articles at the cost of the contractor, and on failure to do so it will be open to Engineer in-charge to make payment at his discretion at a reduced rate and also seek compensation in case of inferior quality of work. It is an admitted position between the parties that no such intimation was ever given by the defendant to the plaintiff. If this be the position the defendant cannot rely upon the latter portion of clause 17 of the condition to deduct from the payment by applying reduced rates. In case the Engineer in-charge of the defendant had found that the work in relation to item at Sr.Nos. 12, 15 and 17 was of inferior quality it was incumbent upon the Engineer in charge to direct in writing that contractor will re-do the work or in absence accept the payment at reduced rates and also pay compensation as provided under the said clause. Admittedly, no such written intimation was ever given nor has any compensation been claimed by the defendant. In these circumstances, the defendant could not have, by its unilateral action, made payment at reduced rates. The Trial Court was therefore justified

in upholding the claim of the plaintiff for a sum of Rs.1292.30.

22 During the course of hearing of this appeal, the attention of the Court was invited to various documents in the form of correspondence which have been exhibited and referred to even by the Trial Court. It is apparent that the plaintiff had drawn attention of the defendant, just when the contract was entered into and when the plaintiff had commenced execution of the work under the contract that there were various items of work which were not covered by the contract and yet as they form part of work which was necessary for completion of the overall contract, the plaintiff carried on with the work informing the defendant that the plaintiff would be raising claim at the appropriate time for the additional work carried out which was not forming part of the contract. In this connection the Trial Court has also recorded that, at no stage on behalf of the defendant the plaintiff was informed that he should not carry out such work which the plaintiff considered to be additional items not specified in the contract. In one of the letters on behalf of the defendant it was stated that work of pointing was mentioned in the Specifications forming part of the contract, to which the plaintiff had replied that in case of any discrepancy between Specifications and the Schedule, what was stated in the Schedule would take precedence. This stand of the plaintiff is the settled position and does not require any elaborate discussion.

23 Position therefore is that out of the six items of additional work claimed by the plaintiff the claim in relation to item no.1 is partly allowed i.e. 1/2 of the expenditure pertaining to carting of pipes and collars, while in relation to items of work specified at Sr.Nos. 2 to 6 the Trial Court was justified in upholding the claim of the plaintiff.

24 The appeal is accordingly partly allowed to the aforesaid extent. There shall be no order as to costs.

Sd/-

(D.A.Mehta,J)

m.m.bhatt